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In the

Supreme Court of the United States

OCTOBER TERM 1965

No. 488

MRS. ADELLE HULLUM, Administratrix,
Petitioner,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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MRS. ADELLE HULLUM, Administratrix,
Petitioner,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TWELFTH SUPREME JUDICIAL DISTRICT OF TEXAS, SITTING AT TYLER, TEXAS

COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Will Respondent be denied the protection of the Seventh Amendment to the United States Constitution?

II. No federally created right under the Federal Employers' Liability Act was denied Petitioner by refusing Petitioner's requested Issues Numbers 1-A and 2-A, inquiring as to the negligence and proximate cause in

"kicking cars on the occasion in question on a downgrade", because the Issues had been fully and fairly submitted to the Jury in other Issues to which no objections were made by Petitioner.

III. No federally created right under the Federal Employers' Liability Act was denied Petitioner by refusing Petitioner's requested Issues Numbers 3-A, 4-A and 5-A, inquiring as to whether Respondent was guilty of actionable negligence in "kicking cars" without first determining that J. T. Hullum was in a safe position aboard the car he was riding, because the Issues had been fully and fairly submitted to the Jury in other Issues to which no objections were made by Petitioner.

IV. The refusal of Petitioner's Specially Requested Instruction No. 2, reading as follows:

> "You are further instructed that the Defendant Railroad is under a continuing, non-delegable duty to provide its employees, including the Plaintiff's decedent, J. T. Hullum, with a reasonable (sic) safe place within which to work."

was not a denial of a federally created right under the Federal Employers' Liability Act because such an Instruction was not necessary to enable the jury to pass upon the Issues submitted.

V. The Trial Court's submission to the Jury of an issue on unavoidable accident and the Appellate Court's refusal to set aside the jury's findings thereon did not deny to Petitioner any federally created right.

a. Petitioner has not properly preserved alleged error in regard to the submission of such Issue inasmuch as Petitioner objected only upon the ground that the same was a double submission of other issues and enlarged her burden of proof.

b. If the point had been properly preserved, the submission of the Issue was proper because it placed no onerous burden upon the Petitioner and, inasmuch as Petitioner did not procure a finding of actionable negligence against Respondent, the finding of the jury on unavoidable accident is immaterial.

VI. No federally created right was denied Petitioner by admitting into evidence (a) a conversation between Respondent's Engine Foreman, W. B. Bradley, and Petitioner's decedent, J. T. Hullum, and (b) motion pictures demonstrating to the Jury the type of "kicking operations" used in the Tyler Yards, because the evidence, under Federal as well as Texas Court Decisions, is clearly competent and admissible under the facts of this case.

VII. No federally created right was denied Petitioner because there has been no improper judicial review by the Appellate Courts below.

COUNTER STATEMENT

Having selected the forum of the Texas District Court, Petitioner instituted this suit against Respondent seeking damages under the Federal Employers' Liability Act[1] for the alleged wrongful death of her husband, J. T. Hullum. The Safety Appliance Act[2] is not here involved. Petitioner's

[1] Title 45, Section 51, U.S.C.A.
[2] Title 45, Sections 1-46, incl., U.S.C.A.

Decedent, J. T. Hullum, was a member of Respondent's switching crew. He received an injury falling from a boxcar in the Tyler, Texas, Yard on December 13, 1961. It was thought that he was making a good recovery, but suddenly on January 8, 1962, he died, apparently from a blood clot. (S.F. 295) Several acts of negligence were alleged; issues were fully joined by Respondent and the cause was tried before a jury in October, 1963. The cause was submitted to the Jury upon Special Issues under the Texas practice and procedure.[3] Petitioner did not object to the Special Issue submission. By its verdict, the Jury (a) absolved Respondent of negligence; (b) absolved Decedent Hullum of any acts of contributory negligence, (c) found that Hullum's death was the result of an unavoidable accident, and (d) found damages in several sums to various beneficiaries under the Act. Judgment was accordingly rendered for Respondent. The Trial Court carefully submitted the cause, defining the various terms in accordance with Federal decisional law under the Federal Employers' Liability Act. Although Petitioner fully presented all phases of the case to the Jury, she failed to obtain a finding of actionable negligence against Respondent. The Judgment of the Trial Court was Affirmed by the Court of Civil Appeals for the Twelfth Supreme Judicial District sitting at Tyler, Texas, and Writ of Error has been by the Supreme Court of Texas Refused, with the notation, "No Reversible Error." In her Petition for Certiorari, Petitioner now asks this Honorable Court to disregard the fact findings made by the lawfully constituted fact finder and to substitute its views in the

[3] Rules 271-279, incl., Texas Rules of Civil Procedure

way Petitioner claims the Jury should have found the facts. Petitioner prays this Court to upset this Jury verdict on the ever-elusive and nebulous contention that because the Jury did not give credence to her theory of the case, she was denied some "federally created" right. The Petitioner, insofar as is discernable to us, does not make clear the "federally created" right or rights she was denied. This brings us to remark that we cannot accept the unnecessarily verbose "review" of the evidence by Petitioner, appearing at Pages 10-16 of the Petition for Certiorari because only a portion thereof—slanted to her view—is mentioned. For instance, at Page 11 of said Petition it is stated that "Switchman Strother saw this happen, and is the only eye witness to the event." Petitioner does not mention that Witness Strother *gave two different versions* of the occurrence and his credibility before the Jury was totally destroyed. (Cf. S.F. 45-49, with S.F. 454-465.) An abundance of evidence was offered by Respondent showing an absence of any negligence on the part of Respondent or any member of Respondent's switching crew. We regret the length to which we are put in order to reply to the Petition, but deem it appropriate to demonstrate that the record amply supports and, in fact, almost compels the jury verdict.

The record discloses that Engine Foreman Bradley testified that J. T. Hullum aligned the proper switch and crossed to the opposite side of the track and was lost from his view when the boxcars were pushed between him and Mr. Hullum; that when he last saw J. T. Hullum, the latter was in the proper position to ride the cut of cars and set the

brake. This was the *usual* and *customary* way of performing this particular portion of the switching operation. (S.F. 334-336, and 342-344) Crew member Strother testified that he saw J. T. Hullum during the entire portion of the switching operation in question up to and including the time of the accident. (S.F. 69-71 and 74-75) The record is void of any testimony to the effect that any member of the crew failed to keep Hullum in view at a time when ordinary prudence would have demanded that he be in a position to actually see J. T. Hullum.

Witnesses Bradley and G. H. Bivens each testified that the cars were moving at only four to six miles per hour, which they considered a safe speed, taking into account the existing conditions on the occasion in question. (S.F. 154-156, 188-190, 199-210, 346-347, and 392) Bradley further testified that "kicking" the cars was not unusual, but was a *customary practice* in the Tyler Yard. (S.F. 204-207) Bradley testified, and Strother agreed, that the cars in question were not kicked harder than they should have been. Each testified that the "kick" in question was an ordinary one and was "Not too hard". (S.F. 86 and 204-207) Witness Strother further testified that, prior to the accident, Hullum had positioned himself on top of the car. (S.F. 70-71) There was no direct evidence that any member of the switching crew was furnished an unsafe place in which to work. All of the members of the switching crew agreed that at the time of the accident they were performing a *normal switching operation.* (S.F. 160-161) The absence of negligence is further corroborated by the very case history given by J. T. Hullum

several days after the accident, which history was recorded by his physician as follows: "He was on top of a car (moving) trying to get from that car to the next. Then lost his balance. Fell between the two cars on the ground and apparently he was dragged for some distance before the cars came to a stop." (S.F. 469.) Equally important is the admission by J. T. Hullum to Witness Bradley that he "did not hold any member of the crew responsible for the accident." (S.F. 209) This Honorable Court's attention is particularly directed to Bradley's testimony found at Pages 318-351 of the Statement of Facts.

With reference to Petitioner's inference that Hullum was under the influence of dope at the time he gave his above mentioned case history, we need only to refer this Court to the testimony of the admitting physician, Dr. Dimitri Boosalis, whose deposition was taken and offered into evidence by Petitioner. According to Dr. Boosalis, at the time the patient entered the Texarkana Hospital (which was several days after the accident) the patient "was not in distress. * * * He was fully conscious, alert, and able to move his left arm and both his legs." (S.F. 262)

ARGUMENT

I. Will Respondent be denied the protection of the Seventh Amendment to the United States Constitution?

It is apparent that the Petition for Certiorari is simply an appeal by a litigant to a Higher Court to save her from an adverse jury verdict. As has been demonstrated, the evidence was fully presented in the Trial Court and Re-

spondent was by the jury vindicated and absolved of negligence. Surely, Respondent is entitled to the protestion incident to a trial by jury, as provided for in the Federal Employers' Liability Act and as guaranteed by the Seventh Amendment. The jury did not find any negligence against Respondent but Petitioner now asks this Court to substitute its views for those of the Jury and hold to the contrary. This Honorable Court has held many times that the findings of a State Court will be accepted by it where, though the evidence is conflicting, they are not without factual foundation. *Fry Roofing Company v. Wood*, 344 U.S. 157, 97 L. Ed. 168, 73 S. Ct. 204; *Portland Railway Light and Power Co. v. Railroad Commissioner of Oregon*, 229 U.S. 397, 57 L. Ed. 1248; and *Grayson v. Harris*, 267 U.S. 352, 69 L. Ed. 652.

Petitioner is asking this Honorable Court to ignore its rules for testing verdicts in Federal Employers' Liability Act cases. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443. In the *Rogers* Case, it is stated as follows:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employees contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death.

"The Congress when adopting the law was particularly concerned that the issues whether there was employer fault and whether that fault played any part in the injury or death of the employee should be decided by the jury whenever fair minded men could reach these conclusions on the evidence. * * * Congress corrected (court made theories which defeated employee claims as a matter of law) by the 1939 amendments and removed the fetters which hobbled the full play of the basic Congressional intention to leave to the fact-finding function of the jury the decision of the primary question raised in these cases—whether employer fault played any part in the employee's mishap.

"The decisions of this Court after the 1939 amendment teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury."

Petitioner apparently regards the *Rogers* case as a holding that the Jury *must* find the Railroad negligent regardless of the credibility of witnesses. If the Jury does not find negligence, Petitioner would have the Appellate Court find entirely contrary to the jury finding absolving the Railroad of actionable negligence. See also *Maynard v. Durham and Southern Ry. Co.*, 365 U.S. 160, 5 L. Ed. 2d 486, 81 S. Ct. 561 (1961) and *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 5 L. Ed. 2d 20, 81 S. Ct. 6 (1960).

It is stated in *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 7 L. Ed. 2d 798, 82 S. Ct. 780, that the Supreme Court cannot "redetermine facts found by the Jury," and further, "where there is a view of the case that makes the jury's answers to the Special Interrogatories consistent, they must be resolved that way. For a search for one

possible view of the case which will make the jury's findings inconsistent, results in a collision with the Seventh Amendment." Respondent, as well as Petitioner, is entitled to the protection incident to a jury trial as guaranteed by the Seventh Amendment.

II. No federally created right under the Federal Employers' Liability Act was denied Petitioner by refusing Petitioner's requested Issues Numbers 1-A and 2-A, inquiring as to the negligence and proximate cause in "kicking cars on the occasion in question on a downgrade", because the Issues had been fully and fairly submitted to the Jury in other Issues to which no objections were made by Petitioner.

III. No federally created right under the Federal Employers' Liability Act was denied Petitioner by refusing Petitioner's requested Issues Numbers 3-A, 4-A and 5-A, inquiring as to whether Respondent was guilty of actionable negligence in "kicking cars" without first determining that J. T. Hullum was in a safe position aboard the car he was riding, because the Issues had been fully and fairly submitted to the Jury in other Issues to which no objections were made by Petitioner.

Although it is held in the case of *Brown v. Western Ry. of Alabama*, 338 U.S. 294, 94 L. Ed. 100, 70 S. Ct. 105 (1949) that federal rights cannot be defeated by the form of local practice—a holding with which we agree—the rule is equally well settled that in actions brought under the Federal Employers' Liability Act, the rules of practice and procedure

are governed by State laws. *Batton v. Atlantic Coast Line Ry. Co.*, 193 S.E. 674, Cert. Den., 303 U.S. 651, 82 L. Ed. 1112, 58 S.Ct. 750. The matters of admissibility of evidence,[4] submission of special issues,[5] examination of witnesses,[6] the Court's charge,[7] and other matters of procedure and practice, the State Court's rules obtain. There is no suggestion in the Act that, if Petitioner selects the State Court to enforce her substantive rights, the State Court may not submit the case in accordance with its practice and procedure if the federally created rights are preserved. In the case at bar there has been no subversion of federal rights as established by the Federal Employers' Liability Act. The record does not show that the local procedure followed has deprived Petitioner of a federally created right. The basis of her contention of such deprivation is that by the Court's failure to submit the issue requested, she failed to obtain a federal right accorded here by the Act. Such contention is unsound because there is no conflict between the submission of the case in the Texas Court under its procedural rules and those which would have obtained in a Federal Court. She was entitled to a jury determination of the ultimate issues plead and raised by the evidence. This is exactly what she obtained under the local procedure, and there are no over-exacting local requirements in the case at bar.

Petitioner alleged actionable negligence against Respondent in seven respects. (Tr. 10) However, reduced to con-

[4] St. Louis-San Francisco Ry. Co. v. King, Okla. (1954) 278 Pac. 2d 845

[5] Thompson v. Robbins, 157 Tex. 463, 304 S.W. 2d 111

[6] Atlanta Joint Term v. Knight, Ga. (1958) 106 2d 417

[7] Miller v. Norfolk Railway Company (1954) 83 S.E. 2d 533

trolling ultimate issues, Petitioner's claim was based upon Respondent's (a) failure to provide Petitioner's decedent a safe place in which to work and (b) failure to keep a proper lookout for Petitioner's decedent during a switching (kicking) operation. No other acts of negligence are alleged against Respondent. The Trial Court submitted to the jury five primary issues of negligence. (Tr. 40-42) Omitting subsidiary issues, the Court submitted the following issues relating to primary negligence:

(1) Failure to keep a proper lookout,

(2) Moving the string of cars at an excessive rate of speed during the kicking operation,

(3) Kicking the cars on the occasion in question,

(4) Kicking the cars harder than would have been kicked by ordinary prudent persons in the exercise of ordinary care under the same or similar circumstances; and

(5) Failure to furnish Petitioner's decedent with a reasonably safe place in which to work.

Appropriate definitions and explanatory instructions, to which no objection has been made, were given by the Trial Court. The jury failed to find any of the primary negligence issues in Petitioner's favor. The jury found that neither Petitioner's decedent nor Respondent was guilty of negligence on the occasion in question. Petitioner's complaint is that the Court,

in addition to the issues submitted, should have given additional issues as follows:

(1) Was it negligence to kick the cars on a down grade?

(2) Was Respondent's crew negligent in kicking the cars without first determining that J. T. Hullum was in a safe position aboard the car upon which he was riding?

In *Thompson v. Robins*, 157 Tex. 463, 304 S.W. 2d 111 (1957) in discussing the submission of special issues in a case arising under the Federal Employers Liability Act, the Court states as follows, at page 116 of the opinion:

> "Defendant agrees that this being a railroad employee personal injury case, contributory negligence was no defense, but contends that the principle of comparative negligence was applicable. This being its position, it further contends that the Federal Employers Liability Act, 45 U.S.C.A., supra, merely prescribes the substantive rights of the parties, and that all Federal Employers Liability Act cases are to be tried in accordance with our own Rules of Civil Procedure and not the Federal Civil Rules, 28 U.S.C.A. The Federal Employers Liability Act, 45 U.S.C.A., supra, as well as the Texas Act, Art. 6440, Vernon's Annotated Civil Statutes, both specifically provide that the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. We *agree with the Defendant that the Texas Rules of Civil Procedure control.* The Plaintiff invoked the jurisdiction of the State Courts and the case should be tried as any other suit for damages is tried in the State Courts so far as procedural matters are concerned."

Petitioner does not deny that the Texas Rules of Civil Procedure apply, but contends that the Trial Court should have, under Rule 277, Texas Rules of Civil Procedure, submitted additional special issues relating to proper lookout and alleged negligence in kicking the boxcars on the occasion in question. Petitioner takes the position that the Trial Court's failure to further fragmentize these issues and submit different shades and phases of the same ultimate issues deprived her of certain so-called "federally created rights." Petitioner cites no authorities in support of this proposition, and the cases cited by her are not in point but are concerned with sufficiency of evidence questions.

The relevant Rule here involved in Rule 279 of the Texas Rules of Civil Procedure.[8] The Rule is specific that where the Court has fairly submitted the controlling issues raised

[8] "When the Court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the Court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment."

by the pleading and the evidence, the failure to submit other and various phases or different shades of the same issue does not present reversible error. Since the promulgation of the Texas Rules of Civil Procedure in 1941, the Appellate Courts of this State have admonished Trial Courts to submit to the jury, especially in negligence cases, *only the controlling issues and not to fragmentize* and submit different shades and phases of the same ultimate issues. An unnecessary splitting of an issue was one of the evils sought to be corrected by the Texas Rules of Civil Procedure.

The cases clearly hold that the Trial Courts are not required to submit requested issues which are substantially and sufficiently covered by the main charge. *Thomas v. Billingsley*, 173 S.W. 2d 199, (Err. ref.) Thus, it is held that the Trial Court is given much discretion in framing and submitting the controlling issues. *Dollie Adams Oil Corp. v. Cree*, 279 S.W. 2d 619 (No writ.).

In the case of *Dallas Railway & Terminal Company v. Straughan*, 254 S.W. 2d 882, no writ history, the Court of Civil Appeals held that it was not error to submit as contributory negligence in an automobile accident issues inquiring if the appellee was negligent in failing to apply the brakes of his automobile quicker than he actually did and if his failure to turn his automobile to the left immediately prior to the collision was negligence. In the case the Court submitted issues inquiring as to whether Appellee failed to keep a proper lookout and whether he was driving at excessive rate of speed under the existing circumstances. In holding that it was not error to refuse the

additional requested issues, the Court states that the trial court is not required to submit issues that are merely evidentiary or unnecessary and that it is never required to submit various phases or different shades of material issues submitted. The Court held that the Trial Court had submitted the "controlling issues" raised by the pleadings and the evidence. To the same effect, see *Gulf Oil Corp. v. Walker*, 288 S.W. 2d 173, (No writ); *McAllister v. Gardner*, 373 S.W. 2d 316 (NRE).

In *City of Fort Worth v. Lee*, (1945) 143 Tex. 551, 186 S.W. 2d 954, there was an action by the Guardian of a minor who was injured when his bicycle was driven off of the roadway and fell into a railroad cut. One of the defendants requested an issue inquiring whether in the exercise of ordinary care for his own safety Victor Atkins should have have discovered that he was off of the traveled portion of the street in time to have stopped his bicycle before going into the excavation. The Supreme Court held that the refusal of this issue was not error in view of the fact that the Trial Court did submit an issue inquiring as to whether Victor Atkins "after he rode his bicycle off of the traveled portion of the street, was negligent, as that term has been defined to you, in failing to stop his bicycle just prior to the accident in question." The requested issue was merely a phase or different shade of the issue submitted. Two submissions of the same issue are never required. *Little Rock Furniture Company v. Dunn*, (1949) 148 Tex. 197, 222 S.W. 2d 985.

In *Northwest Texas Motor Lines v. Hodges*, 138 Tex. 280, 158 S.W. 2d 487, the Supreme Court holds that certain requested special issues were properly refused because they were encompassed in other issues submitted by the Court. The petitioner complained because the Trial Court, upon proper request, refused to submit the question as to whether immediately prior to the collision, Hodges was operating his truck at such rate of speed that he could not stop it within the range of his vision. In another requested special issue the same inquired as to whether immediately prior to the collision Hodges failed to reduce the speed of his truck when meeting an automobile with blinding lights, approaching from the opposite direction. The Court held that the requested special issues related solely to the *manner* of Hodges' operation of his truck immediately prior to the collision — one, whether he was so operating it that he could not stop it within his range of vision, the other whether he failed to reduce his speed upon meeting the car with blinding lights. The Court states at Page 489:

> "It has never been the policy of the law to lengthen and complicate special issue charges by requiring Trial Courts to give issues that merely submit various phases or other shades of meaning of an issue already in the charge. It is required only that each controlling issue raised by the pleadings and the evidence be submitted *once* fairly, simply and succinctly. Otherwise, such charge could be drawn out to interminable length, confusing not alone to the jury but to the Court and counsel as well."

The Court held that the Trial Court, having submitted the question as to whether or not Hodges had his vehicle under "proper control", included the subject matter of the refused

requested special issues. This case is directly in point with the one at bar. See also *Smith & Conklin Bros. et al v. Griffith et al*, (1954), 153 Tex. 341, 268 S.W. 2d 124, wherein the Supreme Court of Texas again affirms the law that where the Court has fairly submitted the controlling issues raised by the pleadings and the evidence, it is not error to refuse to submit other requested special issues relating only to various shades of the issues submitted.

In *Pace Corp. v. Jackson*, 155 Tex. 179, 284 S.W. 2d 340, (1955) the Supreme Court held that where an issue had been submitted, which inquired whether the Pace Corporation failed and refused to supply Jackson with cigarettes for his vending machine business, it was not necessary to again submit an issue inquiring whether petitioners offered to supply cigarettes for the vending machine business. The Court held that one of the issues covered the other and the requested issue was merely a phase or shade of the other issue.

In *Prudential Insurance Company of America v. Tate*, (1961) 162 Tex. 369, 347 S.W. 2d 556, the Court states at Page 559 as follows:

> "We hold that the Trial Court did not err in refusing Petitioner's requested Special Issues Nos. 1 and 2. The matters inquired about were not ultimate issues as to liability of the insurance company. The Trial Court submitted the controlling issue on this phase of the case and was not required to submit other and various phases or different shades of that same issue. Rule 279 Texas Rules of Civil Procedure."

It was held in *Pipeline Workers Local No. 38 v. Zachry Company*, 276 S.W. 2d 876, NRE, that a refusal on the part of the Trial Court to submit a requested issue, the subject

matter of which was adequately covered by other issues submitted, was not error.

In *Cunningham et ux v. John Suggs*, C.C.A. (1960) 340 S.W. 2d 369, NRE, the Court had submitted an issue as to whether Suggs stopped his automobile upon the paved or main traveled part of the highway when it was "possible" to stop said vehicle off of the highway. The issue was answered favorably to Suggs. Appellant Cunningham complained because the Trial Court refused to submit to the jury requested special issues inquiring whether Suggs failed to drive his automobile completely off the paved portion of the highway, whether he could have, but failed to, drive his automobile onto the North shoulder of the highway, whether he could have, but failed to, drive his automobile onto the South shoulder of the highway, whether he stopped his automobile in such a position that it blocked the portion of the highway used by the traveling public, and whether he stopped his automobile upon the paved portion of the highway without leaving an unobstructed width of the highway for free passage of other vehicles thereon. The Court held that the matters inquired about in the requested special issues were phases and shades of and were covered by the issues which the Trial Court had submitted. The Court held there was no error in refusing the requested special issues.

In *Goolsbee v. Texas & N. O. Railway Company*, (1951) 150 Tex. 528, 243 S.W. 2d 386, the complaint was made that the Trial Court erred in refusing to submit certain requested issues inquiring as to whether Goolsbee had such apprehension as to lose his power to act voluntarily and deliberately

and further inquiring whether the act of Goolsbee in jumping from his engine was a voluntary one. The Court held this was not error because the subject matter of the requested special issues had been submitted in another issue inquiring whether Goolsbee had acted in an emergency on the occasion.

In *Neyland et al v. Passano*, C.C.A. (1961) 352 S.W. 2d 367, NRE, the Court had submitted an issue as to whether a driver whose automobile struck a small child failed to apply brakes properly. In addition to this issue the Appellant requested an issue as to whether the driver had failed to slacken the speed of the automobile being driven by her. The Court held that the refusal of the Trial Court to submit such an issue was not error because the controlling ultimate issue had been submitted, and that the Trial Court was not required to submit other phases or shades of the same issue, citing Rule 279, T.R.C.P.

To the same effect, see *Blaugrund v. Gish*, 142 Tex. 379, 179 S.W. 2d 266; *Triangle Cab Company v. Taylor*, 144 Tex. 569, 192 S.W. 2d 143; *Dallas Railway & Terminal Company v. Strickland Transportation Company*, C.C.A., 225 S.W. 2d 901, (No writ). In the last case cited the Trial Court was requested to submit a special issue inquiring as to whether the driver of Appellee's truck failed to slow down before entering the intersection at the time and on the occasion in question. The Trial Court had submitted an issue as to whether the truck driver failed to check his speed as he approached the street car track, and whether the truck driver

increased the speed of his truck as he attempted to cross the intersection. The Court held that there was no error in refusing Appellant's requested issue inasmuch as the issues submitted covered substantially the same questions involved in the requested special issue.

See also *Camco Inc. v. Evans*, 377 S.W. 2d 703, (Tex. Civ. App., 1963, Ref. NRE); *Texas & Pacific Ry. Co. v. Snider*, 159 T380, 321 S.W. 2d 280.

In the Case of *Texas & N. O. Ry. Co. v. Pool*, 263 S.W. 2d 582 (No writ), an F.E.L.A. case, the whole basis of the Plaintiff's complaint was that the Defendant was negligent in permitting oil and grease to accumulate upon the end of a cross tie. Although this constituted only one ultimate ground of recovery, the trial court submitted various issues, many of them evidentiary, relating to the negligence of the defendant railroad carrier in permitting the cross tie to become covered with grease. The Court of Civil Appeals held this was error, constituted a multiple submission of Plaintiff's theory of recovery. The case was reversed because of such multiple submission of one ultimate ground of recovery. See also *Crowell-Gifford Furniture Company v. Cloutman*, C.C.A. 276 S.W. 2d 539, N.R.E. Many other authorities to the same effect are collated in Vol. 36A, *Texas Digest*, Section 35 (5) *Trial.*

In the case at bar did the Trial Court fairly submit the *controlling issues* raised by Petitioner's pleading and the evidence? Were the requested issues of the Petitioner mere phases or different shades of the issues that had been fairly submitted by the Court?

Omitting the subsidiary issues as to negligence and proximate cause, the Petitioner requested the Trial Court to submit the additional issues:

> "1A. Do you find from a preponderance of the evidence that kicking of the cars on the occasion in question on a downgrade was negligence?" and
>
> "3A. Do you find from a preponderance of the evidence that the defendant's crew on the occasion in question kicked the cars in question without first determining that J. T. Hullum was in a safe position aboard the car he was riding?"

It is clearly shown by the record that *both* the above requested issues were clearly covered in other issues submitted by the Trial Court.

With reference to the "kicking" operation, the following special issues were submitted:

> "3. Do you find from a preponderance of the evidence that the defendant's switching crew, immediately before the occurrence in question, moved the cars they were switching at a speed in excess of that at which a person of ordinary prudence in the exercise of ordinary care would have moved the cars under the same or similar circumstances?
>
> "5. Do you find from a preponderance of the evidence that the kicking of the cars on the occasion in question was negligence?
>
> "7. Do you find from a preponderance of the evidence that on the occasion in question the cars in question were kicked harder than they would have been kicked by an ordinary prudent person in the exercise of ordinary care under the same or similar circumstances?"

It is obvious that the above three special issues relating to the *manner* of the kicking operation substantially covered the requested special issues as to whether the kicking of the cars on the occasion in question on a downgrade was negligence. It was undisputed, and the evidence from all the witnesses indicated, that the Tyler Yards are on a slight downgrade. No point or issue was made as to whether the contrary fact existed. The Court, therefore, with reference to the manner of the kicking of the cars, gave the Petitioner three "bites at the apple", namely, whether the cars were being kicked too fast, whether they were being kicked too hard, and the global submission of Special Issue No. 5 as to whether the kicking of the cars on the occasion in question was negligence. (Tr. 41) It occurs to us that if the Court had submitted no issue other than Special Issue No. 5, the Petitioner would have no complaint here. Certainly, such was a global submission, completely covering generally the *manner* in which the cars were being kicked on the occasion in question. It is obvious from a mere reading of the requested issues that the subject matter of the requested issues was covered in the issues submitted.

With reference to the requested issue of Petitioner as to whether the defendant's crew on the occasion in question, kicked the cars in question without first determining that J. T. Hullum was in a safe position aboard the car he was riding, the Trial Court did submit a special issue inquiring as to whether the other members of defendant's switching crew failed to keep a proper lookout for J. T. Hullum on the occasion in question. (Special

Issue No. 1—Tr. 40) Accompanying this issue was a definition of the term "proper lookout", which was not objected to by Petitioner. In addition, the Trial Court submitted Special Issue No. 9 inquiring as to whether, on the occasion in question, the Defendant failed to provide J. T. Hullum with a reasonably safe place in which to work. This term likewise was defined by the Court without objection from Petitioner. (Tr. 42) Therefore, the requested Special Issue No. 3A of which complaint is here made, was nothing more than a lookout issue which had been more or less globally submitted in Special Issue No. 1 aforesaid. It might be pointed out that Special Issue No. 1 encompassed the lookout of every member of defendant's switching crew other than J. T. Hullum. Therefore, it occurs to us that Petitioner is requesting only that other phases and different shades of the same ultimate grounds of recovery be submitted. The two main grounds of recovery here were, first, whether the defendant's crew kept a proper lookout for J. T. Hullum's safety during the kicking operation and, second, whether the manner of the kicking of the cars on the occasion in question was negligence. These were amply covered by the issues submitted and we submit that it would have been error for the Court to have further fragmentized these issues. The Supreme Court of Texas, in *Traywick v. Goodrich*, (1963) 364 S.W. 2d 190, held specifically that the issue of lookout should not be fragmentized. One issue in that case inquired as to whether Mrs. Etheridge failed to maintain a proper lookout. The Trial Court submitted another issue inquiring as to whether Mrs. Etheridge failed to ascertain or determine that the way was clear for her to enter the intersection before doing so. The Court

held that the second issue should not have been submitted as it was necessary to submit only one issue on proper lookout. We have the same situation now before this Court. The Trial Court having submitted properly, without objection, an issue as to whether the defendant's crew maintained a proper lookout for J. T. Hullum, it was not required to submit another phase or different shade of the same issue by inquiring as to whether the defendant's crew kicked the cars in question without first determining that J. T. Hullum was in a safe position aboard the car he was riding. If Defendant's crew failed to keep a proper lookout, it certainly failed to first determine that J. T. Hullum was in a safe position aboard the car he was riding before they kicked the cars. Moreover, it can be fairly said that the issue was covered also in Special Issue No. 5 submitted by the Court.

If this cause had been tried in a Federal District Court, it would have been submitted to the jury under Rule 49, Federal Rules of Civil Procedure. In such event the Trial Court would have broad discretion as to the manner in which the Interrogatories were submitted. *DeEugenio v. Allis-Chalmers Mfg. Co.*, 210 Fed. 2d 409; *R. H. Baker & Co. v. Smith-Blair*, 331 Fed 2d 506, 9th Cir. (1964); *Employers Mutual Casualty Company v. Johnson*, 210 Fed. 2d 153, 5th Cir. As stated in *Scott v. Isbrandtsen Co., Inc.*, 327 Fed. 2d 113, (1964) 4th Cir., "A Federal Court has discretion in the use of special verdicts and this discretion is not limited to the decision with respect to such use but extends beyond to the form of the submitted interrogatories

once such decision is made." To the same effect, *McDonnell v. Timmerman*, 269 Fed. 2d 54, (1959) 8th Cir.; *Travelers Ins. Co. v. Truitt*, 280 Fed. 2d 784 (1960) 5th Cir. "Where the Court does determine to use special verdicts or written interrogatories to accompany a general verdict, it has a similar discretion as to the nature, scope and form of the questions to be put to the jury." 2B, Barron & Holtzoff, *Federal Practice & Procedure*. (Page 337)

It follows that, under the Texas procedure, Petitioner probably obtained the submission of *more* issues than she would have obtained under the Federal Rules had the case been tried in the Federal District Court. The Trial Court gave her a fair submission of every ultimate ground of recovery and Petitioner has shown no deprivation of federal rights in the manner of submission.

At Page 24 of the Petition, the case of *Arnold v. Panhandle and Santa Fe Ry Co.*, 353 U.S. 360, 1 Law Ed. 2d 889, 77 Sup. Ct. 840 (1957) is cited. The Court held in that case merely that certain specific findings of a jury did not necessarily conflict with the jury's finding of actionable negligence against the Railroad and that the Petitioner had shown negligence against the carrier. That question is not involved in the case at bar because Respondent has been exonerated by *all* findings of the jury. Petitioner did not obtain favorable findings, either specific or general, as to primary negligence on the part of the Respondent.

At Page 25 of the Petition, there is cited the case of *McAllister v. Magnolia Petroleum Company*, 357 U.S. 221, 78 S. Ct. 1201, which case held merely that a State Court

may not apply its two year statute of limitation to bar an unseaworthiness action that is joined with an action for negligence under the Jones Act. This case likewise has nothing to do with Petitioner's contentions in the case at bar. Finally, Petitioner cites the case of *Bailey v. Central Vermont Ry. Co.*, 319 U.S. 350, 87 Law Ed. 1444, 63 S. Ct. 1062. This Honorable Court, in the *Bailey* case, reversed the Supreme Court of Vermont, which had set aside a jury verdict for the Plaintiff. The case holds that the jury verdict for the plaintiff was supported by sufficient evidence. That situation does not exist in the case at bar.

Petitioner has cited to the Court no case holding that a failure to fragmentize special issues in a case tried in State Court is a denial of any federally created right under the Federal Employers' Liability Act. We suggest that Petitioner can find no case so holding.

IV. The refusal of Petitioner's Specially Requested Instruction No. 2, reading as follows:

> **"You are further instructed that the Defendant Railroad is under a continuing, non-delegable duty to provide its employees, including the Plaintiff's decedent, J. T. Hullum, with a reasonable (sic) safe place within which to work."**

was not a denial of a federally created right under the Federal Employers' Liability Act because such an Instruction was not necessary to enable the jury to pass upon the Issues submitted.

Petitioner alleged in the Amended Petition actionable negligence against Respondent, inter alia, "in failing on the

occasion in question to furnish the decedent, J. T. Hullum, with a safe place in which to work". (Tr. 10) The Trial Court submitted to the jury, without objection by Petitioner, an issue covering such allegation, together with a definition of the terms used therein.[9] (Tr. 42)

Petitioner requested of the Trial Court the additional instruction contained in specially requested Instruction No. 2, as follows: "You are further instructed that the defendant railroad is under a continuing non-delegable duty to provide its employees, including the plaintiff's decedent, J. T. Hullum, with a reasonable safe place in which to work."

There was no evidence presented that on the day of the injury to J. T. Hullum there had been any change in the instrumentalities with which the switching crew performed their duties or in the location of the place where the work was performed or in the personnel composing the crew of which the decedent was a member. Moreover, there is no evidence in the record of the presence of any party or person other than the switching crew members, and there is no evidence that the injury was caused by any act or omission of a third party disassociated from the crew.

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[9] — SPECIAL ISSUE NO. 9

"Do you find from a preponderance of the evidence that on the occasion in question, December 13, 1961, the defendant failed to provide J. T. Hullum, deceased, with a reasonably safe place in which to work?

"You are instructed that by the term 'reasonably safe place in which to work', as used herein, is meant such a place with regard to safety of its employees as would be furnished by an ordinary prudent employer in the exercise of ordinary care under the same or similar circumstances."

Rule 277, Texas Rules of Civil Procedure, was promulgated in 1941, and was taken from Article 2189, Revised Civil Statutes of Texas. The relevant part of the Rule reads:

> "In submitting Special Issues, the Court shall submit such explanatory instruction and such definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such Issues. * * *".

The Rule also added to the language of the Statute, the following clause, "and in such instances the charge shall not be subject to the objection that it is a general charge." It is clear, therefore, that the effect of the changes in the Rule would permit, *where required*, explanatory instructions without the same being objectionable as general charges. The Rule does not authorize and has never been construed as authorizing a general charge to the jury as distinguished from special issue submission. As stated in *Vega v. Grieger*, (1954), 264 S.W. 2d 498, reversed on other grounds, 271 S.W. 2d 85, "Rule 277, supra, authorizes the submission of the cause on special issues and in instances on a general charge, but it does not authorize such submission on both methods at the same time."

It is likewise clear that general instructions are never permitted unless the submission of the same is *necessary* to enable the jury to properly pass upon and render a verdict upon the issues. It has been held that such language in the Rule allows the Trial Judge some choice of method with reference to the submission of a theory of recovery

or defense. The Rule affords a *greater latitude* to the Trial Judge than did the Statute. *Viduarri v. Bruni*, 179 S.W. 2d 818 (Ref. wm.)

> "The term 'explanatory instructions' in the Rule (Rule 277) smacks of a broader meaning than the word 'explanations' and that view is well confirmed by the last clause of the above quoted language from said Rule. This clause will permit explanatory instructions even in the nature of general charges whenever there is good need for same to properly aid the jury. In my opinion, however, this does not license an unlimited use of general charges in a special issue case."[10]

It is apparent that the only reason explanatory instructions are *ever* given in connection with a special issue is to *enable the jury to properly pass upon* the issues. There is no license to give the jury abstract legal instructions with which the jury is not concerned and which cannot serve as a guide in answering the issues. Therefore, in appraising the action of the Trial Court in refusing Petitioner's requested Special Instruction No. 2, the test to be applied is whether such instruction *enabled the jury* to understand and pass upon the issue. Such additional instruction was not necessary because the same was nothing more than the statement of the law with which the jury was not concerned. The instruction did not furnish a guide for any term or phrase used in the issue. It was wholly immaterial whether the Respondent's duty was a "continuing" one or whether the same was "non-delegable" insofar as enabling the jury to answer the inquiries since it furnished no definition of any legal term used in the issues. The jury had before it

[10] Justice Dooley, writing in 20 *Texas Law Review* 32 at Page 36.

a proper definition of "reasonably safe place in which to work" (not objected to by Petitioner) and there was no necessity for the jury to have any further instruction in order to answer the issue. The portion of the requested definitions, "continuing, non-delegable", were simply not material to the issue. There is no evidence in the record that Respondent had attempted to delegate to anyone its duty of furnishing to Petitioner's decedent a reasonably safe place in which to work.

It is not the province of the jury to pass upon the law and in most instances, it is unnecessary that the jury be charged upon abstract propositions of law. It is never proper under special issue submission for a Trial Court to advise the jury of all of the law in connection with a case and at most the law should not be given to the jury except as a guide to enable the jury to reach an answer. Therefore, in determining whether the Respondent, as an ordinary prudent employer, exercised ordinary care in furnishing a reasonably safe place for Petitioner's decedent, J. T. Hullum, to work on the occasion in question, it certainly was not necessary, or even proper, for the jury to know whether the employer's duty was a "continuing" and "non-delegable" one. The instruction could not have aided the jury.

The cases in Texas are clear on this question and fully support the action of the Trial Court in refusing such requested instruction. The leading cases on the interpretation of Rule 277 is *Boaz v. Whites Auto Stores*, (1943)

141 Tex. 366, 172 S.W. 2d 481. The Court, at Page 484, states as follows:

> "The precise question here for decision is whether such change was made by Rule 277, Texas Rules of Civil Procedure, as would authorize the giving of such instruction. The language of Rule 277 bearing upon the particular question for decision is as follows: '* * * In submitting special issues the Court shall submit such explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues, and in such instances the charge shall not be subject to the objection that it is a general charge * * *'
>
> "By comparing this language with that of the statute, Art. 2189, it will be observed that in the rule the words 'explanatory instructions' are substituted for the word 'explanations'. Clearly the rule affords a greater latitude to the trial judge than did the statute, and instructions are now permissible which formerly would have been condemned. However, the rule does not authorize the giving of an instruction which is not 'necessary to enable the jury to properly pass upon and render a verdict on such issues'; and which is calculated to prejudice one of the parties before the jury."

Generally, the Courts have held that instructions giving the *responsibilities* and *duties* of the parties to an action are not authorized under Rule 277 and should not be given. In *Panhandle & Santa Fe Railway Company v. Walker*, (1963) 364 S.W. 2d 438, NRE, the Appellant complained of the refusal of the Court to give the following requested charge to the jury:

> "You are instructed that defendant, Panhandle & Santa Fe Railroad Company owed no duty to plaintiff, an employee of Kellogg Construction Company, to furnish

> him flags or other warning devices, or to place same on or about cars in which plaintiff might be working; its only duty was to exercise ordinary care under the facts and circumstances then existing."

The Court held that such refusal did not constitute reversible error, citing numerous authorities.

In *Texas Bus Lines v. Whatley*, 210 S.W. 2d 626, NRE, (1948), an automobile collision case, complaint was made of the refusal of the Trial Court to give the following special instruction:

> "As between defendant, Texas Bus Lines, and the Defendant Ellision, the driver of the bus owed no greater duty to protect plaintiff, Mrs. Whatley, than did the defendant Ellison."

The Court approved the refusal of this instruction, stating that the requested charge was a general one and the Court did not believe that the requested charge was necessary to enable the jury to properly pass upon the issues.

In *Tripp v. Watson*, 235 S.W. 2d 677, NRE (1950) the requested special instruction, refused by the Trial Court, was as follows:

> "You are instructed that Art. 6687b, Sections 2, 7 and 9, Revised Civil Statutes of Texas (Vernon's Ann. Civ. St. Art. 6687b, Sections 2, 7 and 9) prohibit the operation of passenger or commercial vehicles upon the highways of this State by any person unless such person has the valid license an operator, commercial operator or chauffeur. You are further instructed that Art. 6687b, Revised Civil Statutes of Texas, requires an applicant for an operator's, commercial operator's, or chauffeur's license to successfully pass an examination prior to the issuance of a license."

The Appellate Court held that the requested instruction was not one which would have aided the jury in answering any of the issues submitted to it, nor was it a definition of any term contained in the charge.

In *Mosby v. T & P Railway Co.*, 191 S.W. 2d 55 (1945) (no writ), the Appellant railroad requested the following special instruction.

> "A railway company is not to be regarded as an insuror of the safety of its employees, but it is compelled to use ordinary care in providing reasonably safe and proper equipment, appliances and places where its employees can follow their vocation."

In condemning such a requested instruction, the Court held that although the same is not to be condemned as a general charge under Rule 277, such instruction was not necessary to enable the jury to properly pass upon and render a verdict on the issues. We submit that this case is directly in point and that the special instruction requested by Petitioner in the case at bar is no more necessary than the one condemned in the cited case. The Court, in *Gonzales v. Orsak*, 205 S.W. 2d 793 (1947) (no writ) held as reversible error the giving of the following special instruction:

> "It is the duty of the driver, rider, or operator of a vehicle about to be overtaken and passed to give way to the right in favor of the overtaking vehicle on suitable and audible signal given by or on behalf of the operator, driver, or other person in charge and control of such overtaking vehicle if such overtaking vehicle be a motor vehicle."

While the Court stated that there were no pleadings justifying such an issue, under Rule 277, the Court should only

submit explanatory instructions as *shall be necessary* to enable the jury to properly pass upon and render a verdict on the issues. As given, the instructions constituted error.

Other examples of instructions properly refused: An instruction that a dog is a domesticated animal and that the owner or person in control of such domesticated animal has no responsibility or duty imposed upon him, under the law, to confine or restrain such dog unless such dog is of such vicious nature as would cause him to stray from the premises, etc. *Dakan v. Humphreys*, 190 S.W. 2d 371 (1945) (No writ); an instruction to the effect that a Reclamation District, through its Board of Directors, had the exclusive power to determine the necessity or convenience of taking a person's property, except where the exercise of such power involves a clear abuse of discretion. *Brazos River C. and Reclamation Dist. v. Harmon*, 178 S.W. 2d 281 (1944) Ref. wm.

A case directly in point clearly upholding the refusal of Petitioner's requested instruction, is *Guthrie v. Sinclair Refining Company*, 320 S.W. 396 (1959) NRE, Cert. den., 4 Law Ed. 2d 120. This was an action brought under the Jones Act[11] for personal injuries sustained when the plaintiff stepped upon a short length of line which lay on the lower deck level of a ship. The Trial Court submitted negligence in the form of asking the following Issue: "Do you find

[11]—46 U.S.C.A., Section 688. This Section extends to any seaman who suffers personal injury in the course of his employment a cause of action identical with the rights and remedies of railway employees under the Federal Employers Liability Act, Section 51, et seq.

that at, and immediately prior to, the time Eugene D. Guthrie suffered injury, if any, the presence of the line, if any, made that part of the deck where it lay not a reasonably safe place to work?" In connection with this special issue, the Court gave the following instruction: "By the term 'reasonably safe place to work' is meant a place in which the work to be carried on can be done with reasonable safety".

The plaintiff requested an issue as follows: "Do you find from a preponderance of the evidence that defendant failed to furnish to Eugene D. Guthrie at the time, and on the occasion of his injury, if any, a reasonably safe place in which to work?" In connection with the plaintiff's requested issue, he also requested an explanatory instruction making clear the federal law as to the distinction between the "absolute" and "non-delegable" duty of the employer and the duty of ordinary care imposed upon the employer. The Court held that the requested instruction in connection with plaintiff's requested issue was an instruction on the law, with which the jury was not concerned and that its refusal was proper. The Court stated that the instruction requested in connection with the requested issue *was not necessary* to enable the jury to properly pass upon and answer the issue relative to a safe place in which to work. The Court stated that had the Court given such instructions, the same would have been improper and error.

We submit that this case is directly in point and makes it clear that the Trial Court in the case at bar was correct in refusing Petitioner's requested Special Instruction No. 2!

A closely analogous case is found in *Robinson v. Gulf, Colorado & Santa Fe Railway Co.*, (1959) 325 S.W. 2d 432, err. ref., cert. den., 80 Sup. Ct. 672, 362 U.S. 919, 4 Law Ed. 2d 739. Suit was brought under the Act for damages for the death of an employee of the defendant carrier. Numerous special issues were submitted inquiring as to specific acts of negligence. The Trial Court refused a specially requested issue inquiring as to whether the defendant failed to provide the decedent with a safe place to work. The Appellate Court held that the specific issue submitted included all of the grounds upon which a finding of unsafe place to work could be based. In the case at bar, of course, in addition to the specific acts of negligence submitted by the Court, there was also submitted Special Issue No. 9, which was a global submission or a general submission of that issue. (Tr. 42) The important holding in the *Robinson* case, however, is that even if it was error for the Trial Court to have failed to submit the issue of unsafe place to work, the error was of such nature that it "probably did not cause the rendition of an improper judgment" as contemplated by Rules 434 and 503, Texas Rules of Civil Procedure. In the case at bar, of course, it is strongly evident that there is no harm inasmuch as the Trial Court gave not only the global form of submission, but also the specific issues.

On the point under consideration, we conclude with the citation of *Archey v. Nederlandsch-Amerikaansche Stoom Maat.*, 354 S.W. 2d 688, cert. den., 9 Law Ed. 2d 236, 371

U.S. 929, 83 Sup. Ct. 299. This action arose under the Jones Act and was an action for damages brought by a stevedore injured while storing cargo in a wharfed vessel. A take nothing judgment was rendered. The complaint upon appeal was directed to the Trial Court's action in refusing to instruct the jury as follows:

> "You are instructed that the applicable law imposes an absolute duty upon Defendant to furnish dunnage in the hatch where it was to be used that was reasonably suitable for the purpose of stowing the steel drums with safety. Defendant cannot delegate such duty to any stevedoring company nor can it contract such duty away to any other party."

In affirming the Trial Court's judgment, the Court held that the requested instruction was not, under Rule 277, necessary to enable the jury to pass upon and render a verdict upon the issues. Instructions in the nature of a general charge are exceptional, and are to be given *only* when the necessity therefor exists. At page 692 of the Court's opinion, the Court states:

> "How knowledge of the legal obligation of Holland-America Line's non-delegable duty to furnish suitable dunnage would have aided the jury in determining from the facts before it that the dunnage used was or was not a proximate cause of Archey's injury is not apparent."

That statement is directly applicable to the case at bar and fully sustains our contentions that Petitioner was denied no federally created right by the refusal of the additional charge on the law.

V. The Trial Court's submission to the Jury of an issue on unavoidable accident and the Appellate Court's refusal to set aside the jury's findings thereon did not deny to Petitioner any federally created right.

a. Petitioner has not properly preserved alleged error in regard to the submission of such Issue inasmuch as Petitioner objected only upon the ground that the same was a double submission of other issues and enlarged her burden of proof.

b. If the point had been properly preserved, the submission of the Issue was proper because it placed no onerous burden upon the Petitioner and, inasmuch as Petitioner did not procure a finding of actionable negligence against Respondent, the finding of the jury on unavoidable accident is immaterial.

Preliminarily, we wish to point out that Petitioner's claim that the submission of an Issue on unavoidable accident deprived her of a federally created right is being raised for the first time in her Petition for Certiorari. Petitioner did object to the submission of Special Issue No. 20 (unavoidable accident) on the ground that it was a double submission of other issues in the case, thereby increasing Petitioner's burden of proof. (See Paragraph X, APPENDIX "N", Pet. for Cert.) There was no attempt on her part to demonstrate that by submitting the issue, she was deprived of a federally created right. We submit that the point has not been properly preserved. *Atlantic Coast Line Ry. Co. v. Mims*, 242 U.S. 532, 61 L. Ed. 476. Be that as it may, however, Petitioner's complaint regarding the submission of this issue is purely academic. The jury found that there was

no negligence on the part of the Respondent and the finding of unavoidable accident was immaterial under the facts of this case. If Petitioner had met her burden of establishing primary negligence on the part of Respondent, she, at the same time, with no additional burden, would have established that it was not an unavoidable accident. The very definition of unavoidable accident demonstrates this. Therefore, there was no onerous burden placed upon Petitioner and no federally created right has been denied her. Moreover, the submission of the issue was proper because, under the testimony of the Decedent, J. T. Hullum, unavoidable accident was clearly raised. (S.F. 209, 469)

VI. No federally created right was denied Petitioner by admitting into evidence (a) a conversation between Respondent's Engine Foreman, W. B. Bradley, and Petitioner's decedent, J. T. Hullum, and (b) motion pictures demonstrating to the Jury the type of "kicking operations" used in the Tyler Yards, because the evidence, under Federal as well as Texas Court Decisions, is clearly competent and admissible under the facts of this case.

W. B. Bradley, who was a member of the switching crew on the occasion in question, was not a party to this lawsuit. His deposition had been taken by Petitioner and a portion of the deposition was offered by her upon the presentation of its main case. Thereafter, Respondent offered certain portions of this deposition. The part of which complaint is now made is that portion covering a conversation Mr. W. B. Bradley had with the deceased, J. T. Hullum, while

the latter was in the hospital in Tyler. The portion of the conversation to which objection is made is as follows:

> "Q. Did he (J. T. Hullum) tell you anything about what had happened?
>
> "A. No, sir. Other than he said he didn't hold any member of the crew responsible or feel any ill feeling toward any member of the crew about the accident." (S.F. 209)

Petitioner objects to this on the grounds that it was a self serving declaration on the part of the witness, Bradley, the same was hearsay, and was a conclusion. Petitioner also made reference to the Dead Man's Statute but it is not clear that he made that additional objection to the proffered testimony.

If we correctly understand Petitioner's Point, he objected to the testimony on the grounds that it was hearsay, a conclusion on the part of the declarant, and in contravention of the Dead Man's Statute, Art. 3716, R.C.S. Texas.

The point is not well taken because such a statement by Mr. Hullum to the witness, Bradley, was admissible as an Admission and, as such, constitutes a well recognized exception to the hearsay rule. Admissions are to be distinguished from declarations against interests. Admissions are received as original evidence against the party making them. They constitute an exception to the hearsay rule, and must come from a party in interest or his agent or predecessor, whereas a declaration against interest may come from anyone. McCormick & Ray, *Texas Law of Evidence*, Vol. 2, Page 21. The statement made by J. T. Hullum

to Bradley was admissible against Petitioner because the Petitioner stood in the shoes of J. T. Hullum. If J. T. Hullum could not have recovered in this case had he lived, certainly the Petitioner could not recover. J. T. Hullum was the predecessor of Petitioner and the testimony is clearly admissible against Petitioner.

In *McLean v. Hargrove*, 139 Tex. 236, 162 S.W. 2d 954, (1942), it is stated that the rule in Texas is that Admissions, declarations or statements made by a person against his interests are admissible against him *or those claiming under him.* In *Hupp et al v. Hupp*, 235 S.W. 2d 753, NRE, the Court held that statements made by a deceased against his interests to third persons during his lifetime were admissible against those claiming under him.

This same type of evidence was held admissible in *Lubbering, Administratrix, v. N. O. Ellison, Jr.*, 342 S.W. 2d 796 (No writ) (1961).

Nor is there any merit in Petitioner's contention that the testimony was inadmissible because the same was a conclusion. The law is well settled that a party's admissions are *in no way limited by the opinion rule.* McCormick & Ray, in Vol. 2, *Texas Law of Evidence*, at Page 23, state as follows:

> "This is clearly supported by every day practice in our courts, where statements made by a party that he was 'at fault', 'in the wrong', and like inferential conclusions are customarily received in evidence against him without question. *The opinion-rule is a rule designed to regulate the examination of witnesses on the stand,* so as to receive from them as far as practicable concrete descriptions, rather than opinions which describe

> less definitely the facts inquired about. Obviously, this policy can have no application to the question of admitting statements made out of court, for such statements may be of great value as evidence, whether or not they happen to be what would be called in the courthouse 'facts', meaning the most concrete description of the situation, or 'opinion', meaning a less concrete statement."

An almost identical situation was presented in *Hovey et al v. See et al*, 191 S.W. 606, No writ. In that case, the surviving widow brought suit for the death of her husband, who was a locomotive engineer for the Kansas City, Mexico & Orient Railway Company of Texas. Briefly, the fatal injuries were received when the Plaintiff's decedent had operated a passenger train into San Angelo, Texas. He noticed the engine he had operated attached to an outgoing north bound passenger train. He went over to it and was inspecting it while it was in a stopped position. Another engine on a parallel track struck the engineer, injuring him, and resulting in his death. *On the way to the hospital*, the engineer stated to Witness Robinson *that he did not blame anybody* for the accident; that it was caused simply because he, the deceased, stood up there and let an engine run over him.

The Trial Court excluded this testimony, but the Appellate Court reversed the case for such exclusion and *held that the evidence* was admissible on two theories, first, res gestae, and second, *as an admission*. The Court further held that such testimony was not opinion testimony, but was a statement of fact from the decedent to the effect that no one else was responsible for the accident.

This case is directly in point and effectively answers Petitioner's contentions in this case. A portion of the Opinion is here reproduced:

> "If the proposed testimony was either res gestae, or would have been against the interest of the party making the statement, then it was admissible, and its exclusion error. See *I. & G.N. RR. Co. v. Anderson*, 82 Tex. 516, 17 S.W. 1039, 27 Am. St. Rep. 902; *Smith v. I & G.N. RR. Co.*, 34 Tex. Civ. App. 209, 78 S.W. 556; *Georgia RR. & Banking Co. v. Fitzgerald*, 108 Ga. 507, 34 S.E. 317, 49 L.R.A. 175; *Walker v. Brantner*, 59 Kan. 117, 52 Pac. 81, 68 Am. St. Rep. 344; *Hughes v. Delaware & H. Canal Co.*, 176 Pa. 254, 35 Atl. 190; *Holman v. Boston Land & Security Co.*, 20 Colo. 7, 36 Pac. 797; *Lord v. Refining Co.*, 12 Colo. 390, 21 Pac. 148; *Eastman v. Bennett*, 6 Wis. 232; *Dreher v. Town of Fitchburg*, 22 Wis. 675, 99 Am. Dec. 91; *Gulzoni v. Tyler*, 64 Cal. 334, 30 Pac. 981; *Helman v. Pittsburg etc Ry. Co.*, 58 Ohio St. 400, 50 N.E. 986, 41 L.R.A. 860; *Southern Ry. Co. v. Cochran*, 42 South. 100; *Williams v. Norton Bros.*, 81 Vt. 1, 69 Atl. 146; *Brown v. Stutson*, 100 Mich. 574, 59 N.W. 238, 43 Am. St. Rep. 462; *Pead v. Trull*, 173 Mass. 450, 53 N.E. 902; *Hurlburt v. Hurlburt*, 128 N.Y. 420, 28 N.E. 651, 26 Am. St. Rep. 482; *Haynes v. Trenton*, 123 Mo. 326, 27 S.W. 622; 1 R.C.L. p. 502, par. 43; 4 Chamberlayne, Modern Law of Evid. Section 2773; 1 Greenleaf, Evid. (16th Ed.) Sects. 147-150; 2 Jones' Commentaries on Evid. 390; 6 Thompson, Neg. Sect. 7738; 2 Wigmore, Evid., Sect. 1455 et seq.
>
> "(2) The writer is inclined to believe that for the both reasons its rejection was error, but, since the court is in accord with the view that it was admissible as a statement against interest, it is not necessary to pass upon the question as to whether it was admissible as res gestae."

* * * * *

> "Besides this, the declaration in question went further than that of either of the other witnesses, in that the declarant stated *that he did not blame anybody for the accident*, thereby in effect saying that he absolved any other party from blame; and it was not a matter of opinion, because he knew whether or not anybody was to blame for the accident. We therefore sustain this assignment, and hold that the Court erred in excluding the testimony."

This rule has been adopted in Texas and the above quoted text is found and affirmed in *Taylor v. Owen*, 290 S.W. 2d 771, (1956) NRE. In the *Taylor* case the defendant had made a prior admission that plaintiff "was not at fault in any way". This statement was admitted as an Admission against the defendant.

In *Farrand v. Houston & TCR Co.*, 205 S.W. 845, err. dism., a Plaintiff was suing for personal injuries and the defendant offered evidence that soon after the injury the plaintiff stated that it was his fault and that he blamed no one. The Court held such testimony was admissible.

With reference to such testimony being a conclusion, the Court in the *Farrand* case stated as follows at Page 848:

> "The main objective below, and the only one insisted upon here, is that it amounted to a mere conclusion and not the statement of any fact. With this deduction, however, we are not inclined to agree, but rather think, in the light of all the facts and circumstances present here, the same thing might be said of this boy as was said of the engineer in *Hovey, Receiver v. See*, 191 S.W. 606: The declarant stated that he did not blame anybody for the accident, thereby, in effect, saying that he absolved any other party from blame; and it was not a matter of opinion, because he knew whether or not anybody was to blame for the accident."

Finally, Petitioner says that the testimony was in contravention of the Dead Man's Statute, Art. 3716, aforesaid. Even if the Dead Man's Statute were applicable in this situation, (and it is not) the same does not apply to officers, agents, or employees of a party corporation. *Pruett v. First National Bank of Temple*, 175 S.W. 2d 648, (no writ); *Daughters of Tabor v. Fridia*, 91 S.W. 2d 404 (no writ); *Chastain v. Texas Christian Missionary Society*, 78 S.W. 2d 728, err. ref.; *Colonial v. Thedford*, 51 S.W. 263 (no writ); *San Antonio Light v. Moore*, 101 S.W. 867, err. ref., 5 *Texas Law Review* 149 (Page 156); *Lomax v. Marlow et al*, 38 S.W. 228 (no writ); and *Thompson v. McAllen Federated Woman's Building Corp.*, 273 S.W. 2d 105, err. dism.

In the *Thompson* case last cited above, Justice Norvell at Page 107 of the opinion, states as follows:

> "(1) Upon the trial, objection was made to the receiving of much of the testimony above outlined, on the basis of Art. 3716, Vernon's Ann. Tex. Stats., commonly referred to as the Dead Man's Statute. No express ruling on the point was made by the Trial Court, but the objection was carried along with the case. The matter becomes material, however, in considering the sufficiency of the evidence. In our opinion, the testimony was properly received. Although the witnesses may have been officers or agents of the Appellee corporation, it has been settled that the statute has no application to such persons."

Inasmuch as the witness, W. B. Bradley, was not a party to this suit either nominally or formally, the Dead Man's Statute would not apply to his testimony. We submit that the statement made by J. T. Hullum to the witness, Bradley, was clearly admissible as an Admission.

Another complaint of Petitioner is with reference to the admission of certain motion pictures demonstrating to the jury the type of "kicking operation" used in the Tyler Yards. The accident in which the deceased received fatal injuries occurred during a switching operation, commonly known in the railroad industry as a "kicking" operation. This is a highly specialized and technical operation of spotting boxcars efficiently. Since there are other forms of switching operations, it was necessary for the jury to understand the term. It occurs to us that it did no harm for the jury to understand what the witnesses were talking about, and Respondent offered moving pictures demonstrating the type of switching involved. A predicate for this film was first laid by the testimony of witness W. B. Bradley, who was engine foreman in charge of the switching operation both upon the occasion of Mr. Hullman's injury and when the film was made. He testified that the film showed precisely the same type of move which was being made at the time Mr. Hullman was injured. (S.F. 402) As is clearly reflected in the record, the purpose of the film was to demonstrate *only* the type of movement being made at the time of the accident. (S.F. 402) Petitioner's counsel recognized this, (S.F. 424) Witness Bradley testified that as far as practical the movement shown in the film was exactly the same as that made at the time of the accident. (S.F. 441) Respondent produced also witness Jay Oistad, a professional photographer who, at the direction of its counsel, took the moving pictures. The films displayed were properly made and correctly portrayed the objects he had seen with the naked eye. There had been no cutting, erasing or tam-

pering with the film and the same had not been edited prior to bringing it to Court. (S.F. 415-426) Petitioner's counsel objected to the introduction of the film without first having a preview. (S.F. 419) Accordingly, by agreement of all parties, the film was displayed out of the hearing and presence of the jury. (S.F. 421) After having viewed the film, the careful Trial Court permitted only the display of that portion of the film where the photographer had testified there had been no difficulties of any kind, (S.F. 423) holding that Petitioner's objections went to the weight and not to the admissibility of the evidence.

The use of demonstrative evidence has been approved by the Courts (State and Federal) for many years. Motion pictures, as such, likewise have been approved in many cases. The rule in Texas has recently been stated as follows: The determination of the admissibility of demonstration or experimental testimony rests within the discretion of the Trial Judge. Generally, the same is admissible if there is a substantial similarity between the conditions existing at the time of the occurrence which gives rise to the litigation and those in existence at the time the experiment is conducted for demonstration purposes. If the dissimilarity between occurrence conditions and the experimental conditions is minor, or *can be made abundantly clear by explanation*, the same should be admitted. *Ft. Worth & Denver Ry. Co. v. Williams*, Sup. Ct. Texas (1964) 375 S.W. 2d 279. Justice Norvell, in the cited case states at Page 282 as follows:

> "It is not, however, essential that the conditions of the occurrence and the experiment be identical, citing au-

thorities. When there exists a dissimilarity, testimony of an experiment should be excluded when the result thereof would probably confuse rather than aid the jury. There exists an area wherein the determination of the admissibility of proferred experiment testimony rests within the discretion of the trial Judge. This occurs whenever the dissimilarity between the occurrence conditions and the circumstances of the experiment is minor or can be made abundantly clear by explanation."

The Courts have left the determination of admissibility of such demonstrative evidence within the *discretion* of the Trial Judge. As pointed out in *McAllister v. Magnolia Petroleum Co.*, 319 S.W. 2d 411, NRE (1958):

> "Very few tests can be made under the exact conditions present when a prior event occurred. The law requires only that substantially the same conditions must exist. And the Trial Court is allowed *considerable latitude* in determining whether the conditions are sufficiently similar to permit testimony about the tests."

In *Ervay-Canton Apartments v. Hatterick*, 239 S.W. 2d 150, NRE (1951) the Court states: "Allowing real or demonstrative evidence to be introduced in Court rests largely within the discretion of the Trial Court. * * * It is admissible for experiments to be made from such real or demonstrative evidence in the presence of the jury." (Page 152)

The basic principles governing exhibition of still pictures in evidence govern admission of motion pictures, and considerable discretion must be vested in the Trial Court as to accuracy of the picture and as to the relevancy of the picture, particularly as to whether it will tend to aid the jury or to confuse the jury. *Morris v. E. I. DuPont DeNe-*

mours & Co., 139 S.W. 2d 984. (S. Ct. Mo.) The decision of the preliminary question as to whether the conditions are so substantially similar as to authorize the introduction of the evidence is necessarily for the Trial Court, and he has *considerable latitude in deciding it. Pittman v. Baladez*, 158 Tex. 372, 312 S.W. 2d 210 (1958). So, in a case involving a suit against a railroad, the question as to whether to admit a railroad's evidence of a test made on a switch during the course of trial, which test was made nearly one and one-half years after the accident, where the plaintiff claimed the physical situation surrounding the switch was not the same as it was on the day he was hurt, the matter was held to be clearly discretionary with the Trial Court. *LaFrance v. New York, New Haven & Hartford Railroad Co.*, 292 Fed. 2d 649 (1961).

As stated in *Ft. Worth & Denver Ry. Co. v. Williams*, supra, it is not essential that the conditions of the occurrence and the experiment be identical. This has been the rule in Texas at least as early as 1921, when, in the case of *Panhandle & S.F. Ry. Co. v. Haywood*, 227 S.W. 2d 347, er. ref. experimental evidence was offered as to how far a child could be seen by the train crew of an approaching engine. Tests were made under conditions similar to those existing at the time of injury, but there were important differences. The Court held that exact similarity of conditions is not absolutely essential to sustain the introduction of evidence as to the result of experiments, but that there need be only a substantial similarity and that dissimilarity *affects* the

weight rather than the *admissibility* of the evidence. The Court, in the Panhandle case, states as follows:

> "The decision of the preliminary question as to whether the conditions are so substantially similar as to authorize the introduction of the evidence *is necessarily for the Trial Court and he has considerable latitude of discretion in deciding it.*"

The Court, in *Houston E. & W. T. Ry. Co. v. Sherman*, 42 S.W. 2d 241 (Com. App.) held that it was permissible to prove the existence or non-existence of a fact by experiments made for that purpose under circumstances substantially the same as those existing at the time of the occurrence or non-occurrence of the alleged fact. In the cited case one witness was permitted to testify to an experiment made by him about six months after the accident, which experiment was designed to ascertain how far a train approaching a crossing where the accident occurred could be seen. There was testimony that when these experiments were made the conditions surrounding the scene were substantially the same except that the weeds, grass and bushes on the right-of-way of the crossing had been cleared away. The Court held that, with explanation, it was not error for the Trial Court to permit plaintiff to make proof of the observation experiments.

See also *Standard Motor Co. v. Blood*, 380 S.W. 2d 651 (Tex. Civ. App., no writ).

An interesting case appears in *Richardson v. M. K. & T. Ry. Co. of Texas*, 205 S.W. 2d 819, err. dism. (1947). The suit was made by S. A. Richardson against the defendant carrier under the Federal Employers Liability Act to re-

cover for injuries sustained by him while he was operating a machine in a planing mill of the defendant's machine shops. The plaintiff appealed from an adverse judgment. One of his complaints related to the Trial Court's admitting into evidence a technicolor motion picture showing the operation of the machine which allegedly caused the plaintiff's injury. One of his objections was that a proper predicate had not been laid for the showing of the motion pictures because they were not made under the same or similar circumstances as those existing when the accident occurred. The Court upheld the Trial Court in admitting the motion pictures, stating in part at Page 824 as follows:

> "All the authorities recognize the law to be that when a photograph or motion picture is sufficiently verified and is a proper representation of an important fact in issue and that it is instructive on preliminary questions to be determined by the tryer of the facts, the admission or rejection of the picture is a matter which rests largely in the discretion of the trial judge, and that his decision in the matter will not be disturbed by the Appellate Courts unless he has arbitrarily exercised such wide discretion. The question is not whether he acted wisely in allowing the picture to become part of the evidence, but the question for us to decide is, did he abuse his discretion by doing so?"

The Court held that the objections (being that the same does not show the exact conditions at the time of the accident) went to *weight* rather than to *admissibility*. See also *Blake v. Harding*, 54 Utah 158, 180 Pac. 172.

It is clear that under the decisions, Petitioner's objections go to the weight of the evidence and not to its admissibility. As stated in *Panhandle & S.F. Ry. Co. v. Haywood*,

supra, "It seems to be the rule that an exact similarity in conditions is not absolutely essential to sustain the introduction of evidence as to the result of experiments; only a substantial similarity is required, and this similarity affects the *weight* rather than the *admissibility* of the evidence."

Similar holdings were made in *Ft. Worth & Denver Ry. Co. v. Yantis,* 185 S.W. 969, err. ref.; and *Richardson v. M. K. & T. Ry. Co. of Texas,* supra.

Thus, it has been held in many cases that experimental or demonstrative evidence is admissible where only a substantial similarity is shown and where the Court has held that the points of dissimilarity have been satisfactorily explained. The admissibility is left to the sound discretion of the Trial Court. Examples of such evidence held admissible were as follows:

Evidence of an experiment in giving cattle water with sodium bicarbonate to prove that the drinking of the same resulted in a falling off in milk production, *Lone Star Gas Co. v. Thomas,* 345 S.W. 2d 844 NRE:

Experimental testimony relating to the slippery effect certain substances had upon a ladder upon which plaintiff was injured, it appearing that the demonstrative evidence conditions were quite dissimilar from the conditions at the time plaintiff was injured, *McAllister v. Magnolia Petroleum Company,* 319 S.W. 2d 411, NRE;

Experimental testimony regarding a witness' timing that it took a street car to reach one point from another, held

admissible, although conditions greatly dissimilar, *Dallas Railway & Terminal Co. v. Darden*, Com. App., 38 S.W. 2d 777 (1931);

Experimental testimony demonstrating the manner in which a banana peel would smear a rubber mat in a coach where plaintiff had slipped and fallen, held admissible although many of the conditions were dissimilar, *Ft. Worth & Denver Ry. Co. v. Yantis*, supra;

Demonstrative evidence tending to show how far a man could be seen on the track south of the road crossing by persons standing on the crossing, held admissible, *Houston & T. C. Ry. Co. v. Ramsey*, 97 S.W. 1067, err. ref.;

Demonstrative evidence in the form of colored motion pictures demonstrating how defendant's machine was operated, held admissible, *Morris v. E. I. DuPont DeNemours & Co.*, (Sup. Ct. Mo.) 139 S.W. 2d 984. See also 85 A.L.R. 480.

As stated in McCormick & Ray, Vol. 2, *Texas Law of Evidence*, at Page 322, "As the novelty of the use of motion pictures in Court has worn off, the Courts have shown greater liberality in receiving the films where they hold promise of assisting the tryers in resolving any issue." Of course, there are a multitude of cases admitting motion pictures showing activities of claimants in workmen's compensation cases.

It is not controverted by Petitioner that the movies in question were offered merely to demonstrate the *type* of

switching operation in which the crew was involved at the time of the accident. (S.F. 402) The qualifying witness Bradley stated that the operation was "substantially the same as being made at the time of the accident." He testified that, "As far as practical it was precisely the same movement." (S.F. 441) This switching operation was performed not only at the same location, but also the same tracks were being used and the "kicking" movement was made upon the very track where the deceased received his injury. The speed of the cut of cars was precisely the same as had been testified to by numerous witnesses. Moreover, the points of dissimilarity were explained in detail by the witness. There was no occasion for the jury to be misled in any way. Those explanations, taken in conjunction with the purpose for which the demonstration was made, enlightened the jury as to what was meant by a "kicking" movement. It enabled the jury to get a first hand impression of the actual type operation in use at the time decedent received his injury. There was neither an attempt nor a claim made here that Mr. Hullum's accident was being re-enacted. We were demonstrating a "kicking operation" only at the locale where Mr. Hullum received his injury — nothing more. (S.F. 419) Moreover, prior to displaying the movies, Respondent proved beyond contravention, by an experienced photographer, that the pictures were correctly taken with good equipment and good film, that having developed the film, the same correctly portrayed the objects seen by the photographer with his naked eye. Those portions of the film which were defective

because the camera had run down before the switching operation was completed, were *not* shown to the jury and the careful Trial Judge below excluded them. The films clarified for the jury what witness Bradley explained to them and demonstrated before them upon cross-examination by Petitioner's counsel. (S.F. 431-442) The jury, having seen the film, at least had a clearer picture and idea as to what all the witnesses were talking about in the matter of "kicking", "humping", "stretching and bunching the slack", "pulling of the pins", "releasing of tension on the draw bars", and similar technical terms used by these witnesses in this case. Efforts to enlighten the jury so that it may better understand the evidence presented should not be condemned. The use of demonstrative evidence is usually recommended and approved. As stated above, any points of dissimilarity such as temperature, number of cars, different engineers, and different crewmen, were adequately explained prior to the display of the movies. It is inconceivable to us how the jury, in view of all that, could have been misled in any manner. We do not see how the displaying of this demonstrative evidence could have harmed the Petitioner in any way. *Houston & T. C. Ry. Co. v. Ramsey*, supra.

The evidence was clearly admissible under State Law and under Rule 43, Federal Rules of Civil Procedure. The Federal Rule favors the reception of the evidence. It is difficult to see how the admission of this competent evidence denied Petitioner a federally created right.

VII. No federally created right was denied Petitioner because there has been no improper judicial review by the Appellate courts below.

The Petitioner asks this Honorable Court to apply the State standard of the sufficiency of the evidence instead of the Federal standard which has been so carefully established in such cases as *Rogers v. Missouri Pacific Railroad Co.*, supra. In addition to a "no evidence" power of review over the jury's verdict, the State courts of Texas have the power to reverse and to remand a case, even when there is sufficient evidence to require submission to the jury, whenever, in the opinion of the Court of Civil Appeals, the verdict is "against the great weight and overwhelming preponderance of the evidence." Chief Justice Robert Calvert, " 'No Evidence' and 'Insufficient Evidence' Points of Error," 38 Tex. L. Rev. 361; e.g. *In Re King's Estate*, 150 Tex. 662, 244 S.W. 2d 660. This power exists because the Texas Constitution, unlike the Seventh Amendment to the United States Constitution, provides that the Court of Civil Appeals, not the jury, has the final power to decide all fact questions. Tex. Const. Art. 5 Section 6. An unsuccessful effort has already been made to apply the Texas standard to F.E.L.A. cases. In the case culminating in *Deen v. Hickman*, 358 U.S. 57, this Court made it clear that the federal standard, not the Texas standard, applied in F.E.L.A. cases. Nevertheless, Petitioner invites this Court to use the state standard as a device to supplant the jury's function in F.E.L.A. cases tried in Texas courts.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 18 day of October, 1965, a true and correct copy of the Brief in Opposition was served upon the following parties at their last known addresses:

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by placing same in the United States Mail, properly addressed, postage prepaid, CERTIFIED MAIL.

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